

(3)  
No. 89-260

Supreme Court, U.S.

FILED

MAR 1 1990

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

THE STATE OF IDAHO,  
*Petitioner,*  
vs.

LAURA LEE WRIGHT,  
*Respondent.*

On Writ of Certiorari to the  
Supreme Court of Idaho

BRIEF OF *AMICI CURIAE*  
AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE  
OF CHILDREN, AMERICAN ACADEMY OF PEDIATRICS,  
AMERICAN MEDICAL ASSOCIATION, NATIONAL  
ORGANIZATION FOR WOMEN, NATIONAL  
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RHODE ISLAND OFFICE OF THE CHILD ADVOCATE, AND  
SUPPORT CENTER FOR CHILD ADVOCATES  
\_\_\_\_\_

INTERESTS OF THE *AMICI CURIAE*

The American Professional Society on the Abuse of Children (APSAC) is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy.<sup>1</sup> The purposes of APSAC are to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals, to increase knowledge about abuse, and to improve the competence of professionals work-

1. Section II of this brief was prepared by Gail S. Goodman, Ph.D., Department of Psychology, State University of New York at Buffalo and Karen J. Saywitz, Ph.D., Department of Psychiatry, UCLA. Josephine Bulkley, J.D. and others also assisted.



ing with abused children and their families. APSAC was founded in 1987, and now has more than 1100 members.

The American Academy of Pediatrics (AAP) was founded in 1930 to create an independent forum for the special health and development needs of children. AAP is a nonprofit association of approximately 38,000 physicians specializing in the care of infants, children, and adolescents. The AAP's principal purpose is to ensure the attainment by all children of their full potential for physical, emotional and social health. To these ends, AAP's members frequently are called upon to testify regarding the condition of such children. The AAP is concerned that the physician's ability to provide proper treatment and counseling not be burdened by legal requirements surrounding the interview process unless mandated by the Constitution and laws, and that any such requirements be sensitive to the particular difficulties attendant upon detecting child sexual abuse.

The American Medical Association (AMA) is a private voluntary, nonprofit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physicians and medical students.

The National Association of Counsel for Children (NACC) is a voluntary national membership organization concerned with the rights and interests of children who are the subject of child protective, matrimonial, and custody litigation. Established in 1977, the Association has 1200 members in fifty states.

The National Organization for Women (NOW), founded in 1966, is the largest organization in the United States devoted to protecting and securing women's rights. NOW has over 250,000 members and 792 chapters nationwide, and actively supports legal and legislative action to protect victims of child abuse.

The State of Rhode Island Office of the Child Advocate is a state agency designated by the Rhode Island General Assembly to protect the civil, legal, and special interests of abused and neglected children in state care and day care settings.

The Support Center for Child Advocates is a Pennsylvania nonprofit corporation that provides free legal and social services to abused and neglected children in criminal and juvenile court proceedings in the city of Philadelphia. Legal services are provided by staff attorneys and more than four hundred volunteer members of the Philadelphia bar. Social work services are provided through a staff of six social workers.

*Amici*, with the written consent of the parties, submit this brief as *amici curiae* to call the Court's attention to the widespread and potentially harmful impact which several conclusions of the Idaho Supreme Court could have on the way children are interviewed in child sexual abuse cases. This brief supports neither party, and *Amici* take no position on whether the hearsay statements at issue in this case should have been admitted or excluded from evidence.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Sexual abuse of children is a tragic phenomenon affecting thousands of children. Although the precise prevalence of sexual abuse is unknown, research discloses that abuse is widespread. The first national survey investigating personal histories of child sexual abuse was conducted by the *Los Angeles Times Poll* in 1985. "A history of sexual abuse was disclosed by 27% of the women and 16% of the men" surveyed.<sup>2</sup> The American Humane Association estimates that 132,000 children were sexually abused in 1986.<sup>3</sup> The Association also reports that "estimates of the number of children sexually maltreated . . . have increased significantly between 1976 and 1986."<sup>4</sup> Most child sexual abuse is never reported to authorities, and the actual prevalence rate is probably higher than the estimates of the American Humane Association.<sup>5</sup> Age offers no protection from sexual abuse. Victims range from infants to adolescents.<sup>6</sup>

2. Finkelhor, Hotaling, Lewis & Smith, *Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion, and Attitudes*, 4 J. Interpersonal Violence 379, 381 (1989).

3. American Humane Association, *Highlights of Official Child Neglect and Abuse Reporting 1986* 23 (1988) [hereafter cited as *Highlights*].

4. *Id.*

5. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 Child Abuse & Neglect 133 (1983).

6. See *Highlights*, *supra* note 3 at 21.

Although most victims of child sexual abuse go on to productive and satisfying adult lives, the clinical and scientific literature establishes that sexual abuse has serious short and long-term consequences for many victims. In particular, sexual abuse is associated with a wide variety of medical, mental health, and social problems of adolescence and adulthood.<sup>7</sup>

The scope and consequences of child sexual abuse require a decisive response from society and, in particular, from the legal system. As the Court has observed, however, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Furthermore, corroborating medical evidence exists in only a minority of cases.<sup>8</sup> In many cases, the ability to prove abuse turns on children's trial testimony and the admissibility of their out-of-court statements. Because of the paucity of evidence that plagues child abuse litigation, children's hearsay statements play a vital evidentiary role.

Although there are many hearsay exceptions, only a handful are important in the day-to-day run of child abuse cases. The exception employed most frequently authorizes admission of excited utterances. Fed. R. Evid. 803(2). Also of great importance is the exception for statements for purposes of medical diagnosis or treatment. *Id.* 803(4). Of particular importance in the present litigation, courts frequently employ the so-called residual exceptions to admit reliable hearsay statements of children. *Id.* 803(24), 804(b)(5). Finally, and of equal relevance in the present case, a majority of states have enacted special hearsay exceptions for reliable out-of-court statements of children in child abuse litigation.<sup>9</sup> These statutes are essentially residual exceptions for child abuse cases.

The Confrontation Clause of the Sixth Amendment works in tandem with the hearsay rule to exclude unreliable evidence. *Califor-*

7. See *Lasting Effects of Child Sexual Abuse* (G. Wyatt & G. Powell eds. 1988).

8. Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 34 (1989).

9. American Bar Association, National Legal Resource Center for Child Advocacy and Protection, *Protecting Child Victim/Witnesses—Sample Laws and Materials* 51 (2d ed. R. Eatman & J. Bulkley eds. 1987).

*nia v. Green*, 399 U.S. 149, 155 (1970); *Dutton v. Evans*, 400 U.S. 74, 86-87 (1970). Like the hearsay rule, the Confrontation Clause seeks to "advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee v. Street*, 471 U.S. 409, 415 (1985). To this end, "[t]he focus of the Court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' . . . and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement . . .'" *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972).

The Court has long held that a defendant's right to confront accusatory witnesses, although vitally important, is not absolute, and can be balanced against competing interests. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980); *Mattox v. United States*, 156 U.S. 237, 243 (1895). The confrontation right is balanced against the state interests in "effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Ohio v. Roberts*, 448 U.S. 56, 64 (1980). In the context of child abuse litigation, an additional interest is at work. The state has a strong *parens patriae* interest in protecting children. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). In some cases, a child's out-of-court statements are the most powerful evidence of abuse, and the need for the statements is compelling. As stated in *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court has "attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate fact finding, which may require consideration of out-of-court statements." *Id.* at 182. Nowhere is the need for out-of-court statements greater than in child abuse litigation.

The trustworthiness of a particular hearsay statement is evaluated in light of the circumstances of the case. With the residual and child hearsay exceptions in particular, courts consider a wide array of factors to determine whether hearsay passes muster under the Confrontation Clause and the rules of evidence. (Reliability factors considered by the courts are discussed in section IV., *infra*). Unfortunately, in the present case, the decision of the Idaho Supreme Court appears to elevate three reliability factors above all others, and to establish them as virtual litmus tests of reliability. The Idaho court



ruled that a child's statements to a pediatrician during an interview were untrustworthy because: (1) the interview was not videotaped, (2) the doctor employed leading questions, and (3) the doctor was aware that the child may have been sexually abused. *Amici* acknowledge that these factors are relevant in the assessment of reliability. *Amici* respectfully submit, however, that the Idaho court overestimated the value of these factors as indicators of reliability. Exaggerating the importance of videotaping, leading questions, and interviewer knowledge of a child's circumstances will cause courts to place unwarranted reliance on these factors to the exclusion of other, equally important, indicia of reliability, and will lead to exclusion of reliable hearsay.

Most interviews of children cannot, as a practical matter, be videotaped or otherwise recorded. Research and clinical experience establish that it is often necessary and proper during interviews of young children to employ directed questions, some of which may be leading. Finally, contrary to the conclusion of the Idaho Supreme Court, possession by an interviewer of background information on a child need not undermine the reliability of what the child states during an interview. *Amici* respectfully urge the Court not to adopt the Idaho Supreme Court's narrow focus on three reliability factors, and to adhere instead to the well-established judicial practice of considering all factors that bear on reliability of hearsay offered under residual and child hearsay exceptions.

## ARGUMENT

### I. CHILDREN DISCLOSE SEXUAL ABUSE IN A VARIETY OF WAYS, FEW OF WHICH LEND THEMSELVES TO AUDIO OR VIDEOTAPING

Disclosing sexual abuse is difficult for most children, and research demonstrates that in many cases abuse is not disclosed during childhood.<sup>10</sup> Abuse that does come to light is disclosed in several ways. Some children reveal abuse to their parents. Others confide in a trusted adult outside the family, such as a teacher. Children some-

10. Finkelhor, Hotaling & Smith, *Risk Factors for Sexual Abuse in a National Survey of Adult Men and Women*, 14 *Child Abuse & Neglect* 19 (1990) (42% of males and 33% of females did not disclose abuse during childhood until questioned as adults).

times disclose their "secret" to a friend, who, in turn, reports the abuse to their parent. For many children, however, the fear and embarrassment that accompany sexual abuse prevent disclosure. When the child cannot tell, adult suspicion about abuse may be kindled by changes in the child's behavior such as nightmares, fear of specific persons or places, unusual knowledge of sexual matters, sexualized play, or medical evidence of abuse.

The realization that their child has been sexually abused comes as a terrible shock to parents, and the first thought of many is to rush to the pediatrician, family doctor, or hospital emergency room. Thus, in many cases physicians are the first professionals to interview children. Such interviews often occur on an emergency basis in the doctor's office or hospital. In other cases, the first professionals to interview children are police officers or social workers employed by child protective services agencies. These professionals may talk to children at home, in the police car on the way to the hospital, at school, or at a children's shelter. In some cases, children first disclose abuse to mental health professionals providing therapy. In such cases, the therapist may have no advance notice of when the child will unlock the secret of abuse. Thus, children disclose sexual abuse in a wide variety of settings and at unpredictable times. Seldom is a tape recorder or video camera available at the critical moment. Yet, children's statements during interviews may bear all the hallmarks of trustworthiness. Given the myriad circumstances in which children are interviewed, interposition of audio or video recording as a litmus test for reliability leads to exclusion of reliable evidence.

The marked reluctance of many children to discuss sexual abuse during interviews illustrates the danger of equating audio or video recording with reliability. In intrafamilial abuse cases, most victims are intimidated into silence. Summit writes that "[h]owever gentle or menacing the intimidation may be, the secrecy makes it clear to the child that this is something bad and dangerous. The secrecy is both the source of fear and the promise of safety: 'Everything will be all right if you just don't tell.'"<sup>11</sup> Threats and coercion are common in extrafamilial abuse as well. In Finkelhor and Williams' national study of sexual abuse in day care, approximately 50% of victims were

11. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse & Neglect* 177, 181 (1983).

threatened with harm to themselves or their families if they disclosed sexual abuse.<sup>12</sup> In addition to fear of reprisal, many youngsters keep the secret of sexual abuse because they believe the abuse is somehow their fault, and that if they tell, they will be disbelieved, punished, or disliked.

Thus, many sexually abused children are slow to disclose during the interview process. A recent study by Sorensen and Snow illustrates children's resistance to disclosure. The researchers evaluated 116 cases in which sexual abuse was confirmed by criminal conviction, confession, or strong medical evidence of abuse. During early interviews, most children denied having been abused.<sup>13</sup> For many children, disclosure is a gradual process that can take weeks or months. Furthermore, many children disclose a little at a time, to test the reactions of adults. If the interviewer does not respond with shock or disgust, the child feels confident to reveal a little more. Portions of what a child reveals during interviews may be sufficiently reliable to gain admission in evidence, but in most cases it is impossible to videotape hours of interviews extending over days, weeks, or months; revealing again the harm that flows from equating reliability with audio or video recording.

In addition to the serious practical problems raised by audio and videotaping, it is important to note the current divergence of professional opinion on the wisdom of recording interviews. In 1986 the California State Legislature established the Child Victim Witness Judicial Advisory Committee to study investigative and judicial practices pertaining to child witnesses, and to make recommendations to the Legislature for reform. In its Final Report, the Committee wrote that "[t]he value of videotaping interviews with children is a highly controversial issue."<sup>14</sup> The Committee found the issues surrounding videotaping so unsettled that it could offer no recommendation to the California Legislature on whether interviews should

12. D. Finkelhor & L. Williams, *Nursery Crimes: Sexual Abuse in Day Care* 104 (1988).

13. Sorensen & Snow, *How Children Tell: The Process of Disclosure* (Paper presented at The Eighth National Conference on Child Abuse and Neglect, October 23, 1989).

14. *California Child Victim Witness Judicial Advisory Committee: Final Report* 28 (1988).

be recorded.<sup>15</sup>

An issue not mentioned by the Committee, but of great concern to parents of sexually abused children, concerns the confidentiality of videotapes. In some cases, highly sensitive tapes of children have found their way onto television news programs, to the embarrassment of children and their families. Systems for protecting confidential videotapes have not been perfected.

There is no doubt that the difficult task of evaluating the reliability of children's out-of-court statements can be facilitated by audio or videotaping, and taping should be encouraged in some circumstances. It is a mistake, however, to exaggerate the importance of videotaping. Although the presence or absence of a videotape is relevant in the assessment of reliability, videotaping is not the *sine qua non* of trustworthiness. Courts consider a host of factors to determine whether hearsay bears the circumstantial guarantees of trustworthiness required by the Sixth Amendment and the rules of evidence. (See Section IV., *infra*) Videotaping is an important factor, but only one among many. With due respect for the Idaho Supreme Court, *Amici* suggest that the lower court accorded exaggerated importance to videotaping interviews.

Bearing in mind the tremendous practical problems engendered by videotaping, the considerable professional uncertainty and disagreement that surrounds the subject, and the availability of other means to assess reliability, it is respectfully submitted that it would be premature and potentially very damaging to engraft audio or videotaping onto the Sixth Amendment as a litmus test for the reliability of children's hearsay statements.

## II. DURING INTERVIEWS, DIRECTIVE AND LEADING QUESTIONS SHOULD BE USED SPARINGLY, HOWEVER, SUCH QUESTIONS ARE SOMETIMES NECESSARY WITH YOUNG CHILDREN, AND DO NOT NECESSARILY UNDERMINE THE RELIABILITY OF CHILDREN'S HEARSAY STATEMENTS

Interviewing young children is a delicate task requiring considerable skill and patience. There is no single "right" or "wrong" way

15. *Id.* at 29.



to interview children, and professionals continue to develop and improve interview techniques. Various professional organizations have promulgated guidelines for interviewing, which are updated as new knowledge develops.<sup>16</sup>

The consensus of professional opinion is that the interviewer should begin by establishing an atmosphere in which the child feels comfortable and free to talk. Initial questioning should be as non-directive and open-ended as possible to encourage spontaneous statements. When young children fail to respond to generic, open-ended questions, more directive questioning may be necessary. At some point during the interview, it is usually necessary to question the child directly about possible sexual abuse. When directive questioning is employed, the interviewer proceeds along a continuum, usually beginning with questions that simply direct the child's attention to a particular topic, and, when necessary, moving gradually to more specific questions. Highly specific questions, which may be leading, are generally to be avoided unless other methods of questioning fail, and the interviewer possesses reliable information indicating that abuse has occurred. In many cases, however, especially with young children, highly specific questions are necessary to elicit reliable information. No two interviews are the same, and professional judgment and discretion remain key components of the interview process.

The psychological dynamics of sexual abuse, which cause many children to resist disclosure, combine with the developmental immaturity of young children to justify greater use of directive questioning than is ordinarily necessary with older children and adolescents.<sup>17</sup>

16. See, e.g., American Medical Association, *Diagnostic and Treatment Guidelines Concerning Child Abuse and Neglect*, 254 J.A.M.A. 796 (1985); American Academy of Child and Adolescent Psychiatry, *Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse*, 27 J. Am. Acad. Child & Adolescent Psychiatry 655 (1988); American Professional Society on the Abuse of Children, *Proposed Guidelines for Evaluation of Suspected Sexual Abuse in Young Children*, 3 The APSAC Advisor (in press).

17. An analogy can be drawn between the need for leading questions during interviews of young children, and the need for such questions during direct examination of some child witnesses at trial. Normally, leading questions are not permitted on direct examination. Fed. R. Evid. 611(c). However, the Advisory Committee on

Unfortunately, however, the very children who need the most directive questioning are the ones about whom there is the most concern about suggestibility, memory, and ability to distinguish fact from fantasy. Thus, it is important to review current scientific knowledge of children's memory, suggestibility, and ability to differentiate fact from fantasy. An understanding of children's developmental capabilities and limitations makes it possible to gauge the influence of leading questions on the reliability of children's descriptions of sexual abuse. A review of current psychological literature is also needed to update, and, in some respects, take issue with the discussion of child development contained in the Idaho Supreme Court's decision in this case. The Idaho court's conclusions about children's memory, suggestibility, and ability to distinguish fact and fantasy are based in large part on controversial assumptions about child development and proper interviewing technique. Many of the Idaho court's assumptions concerning the reliability of children's statements are not supported by current scientific and clinical literature.

In discussing children's ability to provide accurate reports of events they have experienced or witnessed, it is important to keep in mind that across ages, children vary widely in their abilities. A two-and-a-half-year-old has different abilities than a five-year-old, and a five-year-old has different abilities than a ten-year-old. It is equally important to note that children of the same age differ markedly. One three-year-old will be an excellent reporter of events, while another will say nothing. Thus, in considering children's ability to describe events, one should not treat children as a single, uniform group.

Taken as a whole, research and theory in the field of child development suggest that children, like adults, bring both strengths and weaknesses to the interview room and the witness stand. Children can demonstrate adult-like reliability when providing certain kinds of information, under certain conditions. In other situations,

the Federal Rules of Evidence expressly noted the propriety of leading questions with "the child witness or the adult with communication problems." Fed. R. Evid. 611(c) advisory committee's note. The decisions are legion approving leading questioning during direct examination of children who are reluctant to testify. See, e.g., *United States v. Rossbach*, 701 F.2d 713, 718 (8th Cir. 1983); *United States v. Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981). See J. Myers, *Child Witness Law and Practice* Section 4.6, at 130 n. 16 (1987) (collecting cases).

children perform less well than adults. To further complicate matters, there are some conditions under which children may actually outperform adults. For example, children sometimes observe and remember details that adults overlook. Thus, it is a mistake to conclude that children are uniformly less reliable reporters of events than adults.

#### A. Memory

Memory is not always accurate. This is a truism for adults as well as for children. However, memory for the gist of events and for personally significant events tends to be more accurate than memory for details or for events of little consequence to one's life or interests. Only recently have psychologists focused their study on children's descriptions of real-life events of personal significance to them.

Research suggests that even young children possess the memory skills needed to recall events and testify, at least when they are asked simple questions in a supportive atmosphere.<sup>18</sup> Research shows that even infants have long-term memories for familiar events as well as some novel events.<sup>19</sup> Although infants cannot communicate their memories in words, they can remember events for weeks at a time.

Once toddlerhood is achieved, at about age one, children can retain information for longer durations and can verbalize at least parts of their memories. Familiar, repeated events, as well as novel, one-time events, can be retained in the memories of young children.<sup>20</sup> Traumatic and other negative events, such as sexual assault, that children witness or experience in early childhood, can also be retained, even by two-year-olds, who can use words to describe parts

18. G. Melton, J. Petrila, N. Poythress & C. Slobogin, *Psychological Evaluations for the Courts* 102 (1987).

19. Fagen, *Infants' Delayed Recognition Memory and Forgetting*, 16 J. Experimental Child Psychology 424 (1973); Myers, Clifton & Clarkson, *When They Were Very Young: Almost-Threes Remember Two Years Ago*, 10 Infant Behavior and Development 123 (1987) (behaviors of children approaching their third birthday demonstrated memories retained from infancy).

20. K. Nelson, *Event Knowledge: Structure and Function in Development* (1986).

of their memories.<sup>21</sup> In several studies, some including children as young as three years of age, researchers found that memory for stressful events is even more enduring than memory for nonstressful events in children.<sup>22</sup> In a more limited set of studies, researchers found that stress can inhibit children's memory.<sup>23</sup>

One of the most stable findings in memory research is that when young children are asked open-ended questions, they spontaneously recall less information than older children and adults. This is not to say that young children necessarily remember less, but that their developing memories are not as proficient at the task of "free recall" (that is, recounting an event in response to a very general, open-ended question such as "What happened?").

Although young children typically recall less than older children and adults, research reveals that, absent motivation to lie, children tend to recall real-life events they have experienced quite accurately. Children's recall appears to contain no more error than the recall of older children or adults. When psychologists say that "most of the development of accurate recall skills occurs between the ages of five and ten," as the Idaho court reported in this case, 775 P.2d at 1227, they are referring to the ability to report *greater amounts* of accurate information. The quoted statement should not be taken to imply that

21. Miller & Sperry, *Early Talk About the Past: The Origins of Conversational Stories of Personal Experience*, J. Child Language (in press); Terr, *What Happens to Early Memories of Trauma? A Study of 20 Children Under Age 5 at the Time of Documented Traumatic Events*, 27 J. Am. Acad. Child & Adolescent Psychiatry 96 (1988).

22. Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press); J. Ochsner & M. Zaragoza, *The Accuracy and Suggestibility of Children's Memory for Neutral and Criminal Eyewitness Events* (Paper presented at the American Psychology and Law Association, March, 1988); A. Warren-Leubecker, C. Bradley & I. Hinton, *Scripts and the Development of Flashbulb Memories* (Paper presented at the Conference on Human Development, March, 1988).

23. Peters, *The Impact of Naturally Occurring Stress on Children's Memory*, in *Children's Eyewitness Memory* 122 (S. Ceci, M. Toglia & D. Ross eds. 1987).



younger children tend to be less accurate in their recall than older children and adults. The standard developmental finding is that with age, free recall becomes more complete, not necessarily more accurate. In psychological studies, children tend more often to omit information than to report events that did not occur.<sup>24</sup>

The difficulty young children experience with free recall means that young children often require "cuing" of their memories. Whereas an adult, teenager, or older child might be able to provide a detailed account of an event in response to an open-ended question about "what happened," young children are more likely to need specific questions or reminders of an event to activate their memories.<sup>25</sup> For example, in a study of children's memory for daily routines, two-year-olds generally required more specific prompts than four-year-olds.<sup>26</sup> Price and Goodman found that two-and-a-half-year-olds, on their own, could recall little about a repeated event, but were able to

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24. Children of different ages may make different types of memory errors. One study found that in reporting an event, adults made more errors of "intrusion," that is, of information that did not occur but that would be expected to have occurred (e.g., stating that upon meeting someone, they shook the person's hand when in fact they had not), whereas errors made by young children tended to be fantasy errors, although most young children made no such errors. Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 *Law & Human Behavior* 317 (1986).

Memory researchers used to think that the use of conscious memory strategies such as "rehearsal" (repeating information over and over in one's mind as one might do in trying to remember a new phone number) was necessary for the formation of long-term memories, and that young children did not possess or use memory strategies. These ideas are no longer generally accepted. Craik & Lockhart, *Levels of Processing: A Framework for Memory Research*, 11 *J. Verbal Learning & Verbal Behavior* 671 (1972). Although considerable development occurs in the use of memory strategies between the ages of five and ten years, even young children possess and use simple memory strategies. DeLoache & Todd, *Young Children's Use of Spatial Categorization as a Mnemonic Strategy*, 46 *J. Experimental Child Psychology* 1 (1988); DeLoache, Cassidy & Brown, *Precursors of Mnemonic Strategies in Very Young Children's Memory*, 56 *Child Development* 125 (1985). Children do not, however, use memory strategies as well or as pervasively as do adults. In any case, it is now realized that the use of explicit memory strategies is not necessary for the formation or retrieval of memories. Many real-life events are retained well by children and adults without the use of conscious memory strategies such as "rehearsal" or "elaboration" (relating a new event to previously experienced events).

communicate their memories in more detail when given toy props to act out the event, or when placed back in the room where the event occurred.<sup>27</sup> Thus, unlike adults or even older children, young children often have a special deficit in providing accounts of events on their own. Moreover, young children may lack the words needed to articulate their memories. At times, questioning, as a form of memory cuing, may be required to elicit information from young children.

In sum, young children generally can accurately recall and relate what they have experienced. They may need help to do so, however, which raises the issues of suggestibility and leading questions.

#### B. Suggestibility and Leading Questions

Are young children so suggestible that their reports of sexual abuse during interviews should be rejected unless the interviews are videotaped? There is legitimate concern that young children's reports of sexual abuse become a blend of their initial memories plus information suggested by interviewers, parents, and others. But adults are suggestible too, and children are not always more suggestible than adults.

The argument is sometimes made in child abuse litigation that persons who interviewed a child employed leading questions that may have misled the child into inaccurate or false allegations of sexual abuse. In some cases this argument has merit. It is important to reiterate, however, that the developmental limitations of young children sometimes necessitate careful use of specific and, at times,

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25. *New Directions for Child Development* (Vol. 10, M. Perlmutter ed. 1980); Price & Goodman, *Visiting the Wizard: Children's Memory for a Recurring Event*, *Child Development* (in press).

26. Wellman & Somerville, *Quasi-Naturalistic Tasks in the Study of Cognition: The Memory-Related Skills of Toddlers*, in *New Directions for Child Development* (Vol. 10, M. Perlmutter ed. 1980).

27. Price & Goodman, *Visiting the Wizard: Children's Memory for a Recurring Event*, *Child Development* (in press).

leading questions. Furthermore, modern research discloses that young children are more resistant to suggestive questioning than many adults believe.

Studies on children's suggestibility differ greatly in their relevance to child abuse litigation. Most studies involve brief presentations of pictures, films, or stories that children may not remember well and that do not involve their own bodies.<sup>28</sup> Such studies do not involve personally significant events such as sexual abuse. Goodman and Helgeson caution against generalizing from such studies to children's suggestibility regarding real-life events.<sup>29</sup> Other studies do concern children's suggestibility about personally experienced events, and ask questions like those asked by the physician in the instant case. 775 P.2d at 1225. In its discussion of psychological literature on suggestibility, the Idaho Supreme Court did not differentiate between studies that are relevant to real-life events experienced by children, and studies that are less germane to child abuse investigations and interviews.

Overall, studies have not converged on a simple relation between age and suggestibility.<sup>30</sup> It is clear, however, that children are not always more suggestible than adults. When and if a person (child or adult) is suggestible depends on cognitive, social, emotional, and situational factors such as level of interest or salience of an event. Other factors, some of which were mentioned by the lower court in this case, may also be important, and are discussed below.

Researchers consistently find that children ten to eleven-years-old are no more suggestible than adults. Four to nine-year-olds are sometimes more suggestible than older children and adults. Even

28. Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion: An Empirical Study*, 4 Law & Human Behavior 201 (1989); Loftus & Davies, *Distortions in the Memory of Children*, 40 J. Social Issues 51 (1984).

29. Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L. Rev. 181 (1985).

30. Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in *Children's Eyewitness Memory* 53 (S. Ceci, M. Toglia & D. Ross eds. 1987).

three-year-olds are not always more suggestible, although there appears to be a greater risk of suggestibility in very young children.<sup>31</sup> Young children may be particularly subject to the influence of suggestion regarding peripheral details and ambiguous events. When an event is ambiguous, there is some evidence that young children's labels for the event can be manipulated through strongly worded interrogation, but children's answers to specific questions about the event remain accurate.<sup>32</sup> Resistance to suggestion appears to be highest concerning the core aspects of events. Moreover, participation in an event, as opposed to mere observation, appears to lower children's suggestibility.<sup>33</sup>

In recent years, studies have been conducted which have concerned children's suggestibility when leading questions about abuse are asked. These studies were not cited by the Idaho Supreme Court. For example, researchers have studied children's suggestibility about personally significant and sometimes stressful events such as receiving a genital examination or inoculations by a doctor. Researchers have also studied children's suggestibility regarding crime-like events, as well as nonstressful, noncrime-like events, following which children were interviewed with leading questions such as "He took your clothes off, didn't he?" to determine if false reports of abuse could be elicited. These studies indicate that children as young as four years of age do not make significantly more false reports (for example, by

31. Ceci, Ross & Toglia, *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J. Experimental Psychology: General 38 (1987); Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 Law & Human Behavior 317 (1986); Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in *Children's Eyewitness Memory* 53 (S. Ceci, M. Toglia & D. Ross eds. 1987); M. Zaragoza & D. Wilson, *Suggestibility of the Child Witness* (Paper presented at the Society for Research on Child Development, April, 1989).

32. Clark-Stewart, Thompson, & Lepone, *Manipulating Children's Testimony Through Interrogation*, in *Can Children Provide Accurate Eyewitness Testimony?* (G. Goodman, Chair, Society for Research in Child Development, 1989).

33. Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press); Rudy & Goodman, *Effects of Participation on Children's Testimony* (Submitted for publication 1989).



responding "yes" to the question, "He took your clothes off, didn't he?") than do older children.<sup>34</sup>

Relatively few studies of three-year-old's suggestibility exist, and research discloses no published studies on suggestibility of two-and-a-half-year-old children. When a brief story is read to children, or children view a brief slide sequence, some studies have shown three-year-olds to be more suggestible than older children.<sup>35</sup> Other studies have been unable to replicate these effects, however, calling them into question.<sup>36</sup> When children are exposed to real-life events and then questioned, three- and four-year-olds vary considerably in their abilities, with some three- and four-year-olds being resistant to leading questions concerning abuse and some being suggestible.<sup>37</sup> When three- and four-year-olds are suggestible with regard to acts related to abuse (e.g., having their clothes removed, having their "private parts" touched), their suggestibility is typically limited to a nod of the head or saying "yes." In the studies, spontaneous and detailed comments, such as those made by the child in the present case (i.e., that her daddy "does do this with me, but he does it a lot more with my sister than with me." 775 P.2d at 1225), are typically (although not always) accurate, even when elicited in the context of leading questions.<sup>38</sup>

34. Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press); Rudy & Goodman, *Effects of Participation on Children's Testimony* (Submitted for publication 1989).

35. Ceci, Ross & Toglia, *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J. Experimental Psychology: General 38 (1987).

36. Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in *Children's Eyewitness Memory* 53 (S. Ceci, M. Toglia & D. Ross eds. 1987).

37. Goodman & Aman, *Children's Use of Anatomically Detailed Dolls to Recount an Event*, *Child Development* (in press); Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press).

38. Rudy & Goodman, *Effects of Participation on Children's Testimony* (Submitted for publication, 1989).

Young children's suggestibility is influenced by their understanding of the words used in a question. When children do not know what the term "private parts" means, for example, some may nod their head "yes" when asked if their private parts were touched.<sup>39</sup> The physician in the present case established that the child knew what was meant by the term "pee-pee." 775 P.2d at 1225.

Although it is appropriate to be concerned about use of directive and leading questions during interviews, it is important to reiterate once again the developmental and psychological need in selected cases to use such questions with young children. Although studies to date indicate there is a risk of obtaining some false information as a result of using leading questions with young children, studies also indicate that there is a danger in not using leading questions. For example, when information of a sensitive or embarrassing nature is at issue, leading questions may be necessary to elicit information from children. A study by Saywitz and her colleagues makes this point clearly.<sup>40</sup> Seventy-two five- and seven-year-old girls experienced a medical examination by a pediatrician. As part of the examination, half the girls at each age received a visual inspection of the vaginal and anal areas, and half were checked for scoliosis by touching the spine. When the children were later questioned about the examination, they were first asked an open-ended question ("What happened?"), then asked to demonstrate what occurred using anatomically detailed dolls, and finally asked a set of leading questions, including whether their vaginal and anal areas had been touched. The majority of the children who had received the vaginal and anal examination revealed this part of the examination only when asked specific leading questions about it ("Did the doctor touch you there?"). The genital examination was usually not mentioned when open-ended questions or anatomical dolls were used. In contrast, when the children who had the scoliosis examination were asked leading questions about vaginal and anal touching, the vast majority

39. Goodman & Aman, *Children's Use of Anatomically Detailed Dolls to Recount an Event*, *Child Development* (in press).

40. K. Saywitz, G. Goodman, E. Nicholas & S. Moan, *Children's Memories of Genital Examinations: Implications for Cases of Sexual Assault* (Paper presented at the Society for Research on Child Development, April, 1989).

(92%) resisted the suggestion. However, three children (8%) provided a false "yes." In this study, the researchers found that the risk of obtaining a false report about genital touching when open-ended, doll-aided, and leading questions were used was one percent. However, the risk of children not disclosing the genital inspection was much greater (64%). For most children, the genital examination was revealed only when leading questions were used. Thus, although there was a small danger of obtaining false information from children when leading questions were used, there was a much greater danger that potentially embarrassing information would not be revealed unless leading questions were used.

In the present case, the Idaho Supreme Court was concerned that the child might be especially subject to suggestive questions from the pediatrician because of the child's deference to his status as a doctor. 775 P.2d at 1228. Although there is some evidence in the scientific literature to suggest that children are more suggestible when interviewed by an authority figure,<sup>41</sup> there is also evidence to the contrary.<sup>42</sup>

It should also be noted that to the extent an authority figure might make a young child more suggestible, such results can be reversed by having the authority figure build rapport with the child. In one study, young children who experienced a stressful event as part of their regular health care (i.e., inoculations at a medical clinic) were later questioned by adults. Half of the children were interviewed by an adult who acted warm and friendly toward the child (e.g., smiled, complimented the child, gave the child cookies and juice), whereas the other half were interviewed by an adult who was more distant and cold (e.g., smiled infrequently, did not compliment the child, did not give the child cookies and juice). Three- to four-year-olds were substantially less suggestible when they were interviewed by the friendly adult. Of particular note, the children who were interviewed by the friendly adult were less suggestible on leading questions

41. Ceci, Ross & Toglia, *Suggestibility of Children's Memory: Psychological Implications*, 116 J. Experimental Psychology: General 38 (1987).

42. Brigham, VanVerst & Bothwell, *Accuracy of Children's Eyewitness Identifications in a Field Setting*, 7 Basic & Applied Social Psychology 295 (1986).

relevant to charges of child abuse (e.g., "How many times did she kiss you?" "You took your clothes off, didn't you?").<sup>43</sup> Thus, a doctor who establishes rapport with a child (as a doctor would be expected to do before performing a genital examination on a young child) might well have the effect of reducing the child's suggestibility, despite the fact that the doctor was an authority figure.

In summary, research findings are mixed on whether children are more suggestible when interviewed by an authority figure. To the extent that being interviewed by an authority figure increases children's suggestibility in regard to answers to leading questions about abuse, these effects can be reversed by being supportive of children.

The Idaho Supreme Court expressed concern that leading questions might so taint a child's memory that the child's description of sexual abuse would be unreliable. The lower court wrote that "[t]he problem of tainted memory is much more severe in young children. . . . Once this tainting of memory has occurred, the problem is irremediable." 775 P.2d at 1228. Contrary to the Idaho court's statement, research has not definitively demonstrated that memory can be so tainted by misleading information that accurate memory can never again be reinstated. Some studies have suggested that once a person accepts misleading information, the person's memory is forever tainted, although such studies do not examine memory for real-life events actually experienced by subjects.<sup>44</sup> Evidence concerning irreparable tainting is quite mixed, with some studies showing no permanent effects on memory of misleading information,<sup>45</sup>

43. B. Bottoms, G. Goodman, L. Rudy, L. Port, P. England, C. Aman & M. Wilson, *Children's Testimony for a Stressful Event: Improving Children's Reports* (Paper presented at the 97th Conference of the American Psychological Association, August, 1989); Goodman, Rudy, Bottoms, & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds., in press).

44. E. Loftus, *Eyewitness Testimony* (1979).

45. Bekerian & Bowers, *Eyewitness Testimony: Were We Misled?*, 9 J. Experimental Psychology: Learning, Memory, and Cognition 139 (1983); Lindsay & Johnson, *The Eyewitness Suggestibility Effect and Memory for Source, Memory & Cognition* (in press); McCloskey & Zaragoza, *Misleading Postevent Information and Memory for Events: Arguments and Evidence Against Memory Impairment*



and other studies indicating the possibility of more permanent tainting.<sup>46</sup> Research is inconsistent on whether children who initially accept misleading information about an event are likely to recall the inaccurate information later, when they describe the event.<sup>47</sup> Although it is possible that leading questions can permanently taint memory, the Idaho court exaggerated the certainty of this conclusion.

In the present case, the Idaho court quotes at length from the testimony of a child psychologist who testified for the defendant at trial. At one point, the psychologist contended that children's responses can be easily "shaped." The psychologist went on to state that "one of my colleagues in the Portland area, Bill McGeiver has found that simply by nodding the head and saying "um-hum" he can shape, so to speak, gradually shape behaviors in young children that border on the sexually bizarre." 775 P.2d at 1229. *Amici* would point out that it is unclear from the Idaho court's decision what the defense psychologist meant by behaviors that "border on the sexually bizarre." *Id.* Furthermore, the defense psychologist does not state whether Mr. McGeiver's findings were based on research, or were merely his clinical observations of a few children. Finally, the defense expert provides no clue regarding Mr. McGeiver's credentials. It is clear that the McGeiver findings are not to be found in the scientific literature. *Amici* know of no scientific studies indicating that children or adults can be "shaped" by nodding of the head and saying "um-hum" to make false claims of sexual abuse.

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*Hypotheses*, 114 J. Experimental Psychology: General 3 (1985); Zaragoza, McClosky & Jamis, *Misleading Postevent Information and Recall of the Original Event: Further Evidence Against the Memory Impairment Hypothesis*, 13 J. Experimental Psychology: Learning, Memory, and Cognition 36 (1987).

46. Ceci, Ross & Toglia, *Suggestibility of Children's Memory: Psychological Implications*, 116 J. Experimental Psychology: General 38 (1987); E. Loftus, *Eyewitness Testimony* (1979); Tversky & Tuchin, *A Reconciliation of the Evidence on Eyewitness Testimony: Comments on McCloskey and Zaragoza*, 118 J. Experimental Psychology: General 86 (1989).

47. Clark-Stewart, Thompson & Lepone, *Manipulating Children's Testimony Through Interrogation*, in *Can Children Provide Accurate Eyewitness Testimony?* (G. Goodman, Chair, Society for Research in Child Development 1989); Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 Law & Human Behavior 317 (1986).

### C. Differentiating Fact and Fantasy

Are children so prone to confuse fantasy and reality that their descriptions of events are unreliable? In the instant case, the psychologist testifying for the defense stated that "children who have a mental age of five years and chronological age of five years would have difficulty distinguishing fantasy from reality." 775 P.2d at 1128. The psychologist's statement is not born out by the scientific literature. Some developmental theorists, including Freud and Piaget, have suggested that children routinely confuse reality with fantasy, but researchers have not found evidence to support these claims. Experimental work does not bear out Freud's notion of infantile hallucination or Piaget's belief that children are so egocentric that they routinely fail to distinguish reality from fantasy. Moreover, although children like to use pretend in their play, they seem to know when they are pretending. Thus, the defense psychologist erred when he opined that children cannot distinguish what is real from what is imagined. Modern research suggests that children are less likely than adults to differentiate fact from fantasy in some situations, but not others.

Researchers have examined children's and adults' ability to discriminate between fresh memories of an event itself, memories of one's later thoughts about the event, and memories of what other people have said about the event. Johnson and her colleagues report that children (six-year-olds) show a deficit in some of these areas, but not in others.<sup>48</sup> In Johnson's studies, children were no more confused than adults when asked to discriminate what they saw someone else do or say from what they themselves did or said. Children were not more likely than adults to confuse memories of what two other people did or said. In other words, children accurately remembered who said and did what. When considering the aspects of Johnson's studies that are most relevant to children's ability to distinguish fact from fantasy

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48. Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 J. Social Issues 33 (1984); Lindsay & Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources*, in *Children's Eyewitness Memory* 92 (S. Ceci, M. Toglia & L. Ross eds. 1987).

during child abuse interviews, the children did not have difficulty making the distinction. However, six-year-olds did have more difficulty than adults in discriminating memories of what they themselves had said or done from what they had only imagined themselves saying or doing. Although adults also showed confusion on this task, children did so to a greater extent.

Johnson notes that the relevance of any of these findings for children's testimony may be limited by the fact that the stimuli used in the experiments were artificial (i.e., imagining a picture of an object), and were not embedded in a context that was meaningful to children's lives. Children's understanding and memory of events is considerably improved when the events are meaningfully embedded in their lives.<sup>49</sup> In contrast to the artificial stimuli used by Johnson, crimes that children experience, such as sexual assault, are likely to be compelling, vivid, important, and embedded within the children's lives.

Johnson's research on children's ability to differentiate imagined from experienced events did not include children as young as two-and-a-half years of age. It is possible that such children may have a greater deficit in the ability to distinguish fantasy from reality. The relevant studies remain to be done.

In discussing children's ability to distinguish fantasy from reality, it is not accurate to suggest, as the defense expert did in this case, that children have special difficulty in remembering actions correctly. 775 P.2d at 1228. A number of studies indicate that children's memory is particularly strong for actions.<sup>50</sup>

A final aspect of children's ability to distinguish fact from fantasy relates to the possibility that a young child could fabricate a report of

49. M. Donaldson, *Children's Minds* (1978); K. Nelson, *Event Knowledge: Structure and Function in Development* (1986).

50. Fivush, Gray & Fromhoff, *Two-Year-Olds Talk About the Past*, 2 Cognitive Development 393 (1987); Goodman, Aman & Hirschman, *Child Sexual and Physical Abuse: Children's Testimony*, in *Children's Eyewitness Memory* 1 (S. Ceci, M. Toglia & D. Ross eds. 1987); Jones, Swift & Johnson, *Nondeliberate Memory for a Novel Event Among Preschoolers*, 24 Developmental Psychology 641 (1988).

sexual abuse. It should be noted that young children have little accurate knowledge of adult sexual activities and reproduction.<sup>51</sup> Moreover, several studies have demonstrated that even under conditions of leading questioning, young children are not prone to sexual fantasy.<sup>52</sup> Although young children (e.g., three-year-olds) may at times indicate an affirmative answer to a leading question (e.g., shake their heads or say "yes"), most children have not been found to elaborate on their simple "yes" answers, or to fabricate detailed accounts of sexual abuse in response to such questions.

Even young children are capable of intentionally lying and misstating reality. However, intentional lying generally occurs in young children in order to avoid punishment. Moreover, unlike older children, young children tend to be unconvincing liars, and adults can often detect young children's falsehoods.<sup>53</sup> Unless young children have been personally or vicariously exposed to adult sexual activity, they do not possess the knowledge to fabricate descriptions of such activity.

The child development literature indicates that young children possess the capacity to remember and relate events. Furthermore, although young children are more suggestible than adults in some circumstances, children are not as suggestible as many adults believe, and in some studies young children are quite resistant to suggestive and misleading questioning. Finally, children can usually differentiate the real from the imaginary.

Children, like adults, can be misled by leading and suggestive questions, and professionals who interview young children should

51. R. Goldman & J. Goldman, *Show Me Yours: Understanding Children's Sexuality* (1988); R. Goldman & J. Goldman, *Children's Sexual Thinking* (1982).

52. Goodman & Aman, *Children's Use of Anatomically Detailed Dolls to Recount an Event*, Child Development (in press); Goodman, Rudy, Bottoms, & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds., in press).

53. DePaulo, Stone & Lassiter, *Deceiving and Detecting Deceit*, in *The Self and Social Life* (B. Sclenker ed. 1985).



use such questions sparingly and with caution. In some cases, however, highly directive questioning is required to enable traumatized and frightened children to describe events. As the number of directive and leading questions rises, so does concern about the reliability of a child's out-of-court statements. Thus, when assessing the reliability of a child's statements, it is appropriate to examine the types of questions asked during the interview. This is not to say, however, that the use of leading questions indicates unreliability. Many statements in response to leading questions are trustworthy. Thus, as was the case with videotaping, presence or absence of leading questions is but one of many factors considered in analyzing the reliability of children's out-of-court statements.

### III. MOST PROFESSIONALS BELIEVE THAT INTERVIEWERS SHOULD POSSESS BACKGROUND INFORMATION ABOUT A CASE BEFORE INTERVIEWING A CHILD

The prevailing practice among professionals who interview sexually abused children is to obtain information about the child and the possibility of sexual abuse before conducting the interview. This practice is consistent with the long tradition in medicine, psychiatry, psychology, and social work of obtaining a medical, developmental, or family history before examining or treating a patient.

In the instant case, the Idaho Supreme Court concluded that the child's statements to the interviewing pediatrician lacked trustworthiness because the doctor had a "preconceived idea of what the child should be disclosing." 775 P.2d at 1227. That is, because the doctor knew the child may have been sexually abused, the interview necessarily produced unreliable information. With all due respect for the lower court, *Amici* urge this Court to reject the conclusion that prior knowledge of a child's circumstances undermines a professional's ability to elicit trustworthy information from the child. It is true that interviewers should not entertain general preconceptions such as "children never lie about sexual abuse." There is an important distinction, however, between preconceptions that can cloud judgment, and background information that is needed for a thorough evaluation of possible abuse.

Given that at least mildly leading questions are often necessary with young children, interviewers must know something about the alleged abuse in order to frame meaningful questions. Young children cannot be expected to understand the purpose of an interview. Unlike an adult rape victim, who understands the context and meaning of a question such as "What happened?", young children often have no idea of the purpose of the interview or the topic of interest until it is introduced by the interviewer through specific questions.

The substantial majority of professionals who work with sexually abused children believe that, in the discretion of the professional, it is proper to obtain relevant background information before interviewing children. Interviewers perform more effectively when they are armed with relevant information.

### IV. THE COURT SHOULD REAFFIRM THE TOTALITY OF THE CIRCUMSTANCES APPROACH TO RELIABILITY USED BY FEDERAL AND STATE COURTS TO ASSESS THE RELIABILITY OF CHILDREN'S HEARSAY STATEMENTS OFFERED UNDER THE RESIDUAL AND CHILD HEARSAY EXCEPTIONS

During the 1980s, Federal and State courts grappled with the difficult task of assessing the reliability of children's hearsay statements offered under the residual and child hearsay exceptions. The uniform approach of the courts is to consider all circumstances that bear on trustworthiness. The following factors, among others, are discussed in the cases, and provide an adequate basis for assessing the reliability of children's hearsay statements.<sup>54</sup>

54. Professor Graham provides a thorough analysis of factors relating to reliability. See Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn. L. Rev. 523 (1988), where the author writes:

Courts consider several criteria in evaluating the trustworthiness of a hearsay statement, including the credibility of the statement and the declarant at the time of the statement in light of the declarant's personal knowledge, the availability of time

If the content of a child's hearsay statement is supported by other evidence, the reliability of the statement may be bolstered. *State v. Allen*, 157 Ariz. 165, 755 P.2d 1153, 1164 (1988). In some cases, an eyewitness corroborates the child's statement. *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 812 (1987). In others, medical evidence supports the statement. *People v. District Court*, 776 P.2d 1083, 1090 (Colo. 1989). The fact that a child's statement is overheard by more than one person may enhance the reliability of the statement. *State v. Cooley*, 48 Wash. App. 286, 738 P.2d 705 (1987).

Courts view the spontaneity of a child's statement as an important indicator of reliability. The more spontaneous the statement, the less likely it is to be fabricated. *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987). Reliability is also enhanced when a child repeats an out-of-court statement more than once, and when each version is consistent. *United States v. Cree*, 778 F.2d 474, 477 n.5 (8th Cir. 1985); *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987); *State v. Kuone*, 243 Kan. 218, 757 P.2d 289, 292 (1988). When a child is inconsistent, doubts arise about trustworthiness. This is not to say, however, that complete consistency is required. Young children are often inconsistent regarding peripheral details of events they have experienced. What is more important is consistency regarding core aspects of events.

The reliability of a hearsay statement can be influenced by questioning during interviews and in other situations. When a

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to fabricate, the declarant's bias, and the suggestiveness created by leading questions. Courts further consider other, corroborating factors arising after the statement was made, including the credibility of the person testifying to the statement, the availability of the declarant at trial for cross-examination . . . , whether the declarant has recanted or reaffirmed the statement, and the existence of corroborating physical evidence. In child sexual abuse cases, courts should also consider whether the child's statement discloses an embarrassing event that a child would not normally relate unless true, is a cry for help, employs appropriate childlike language, or describes a sexual act beyond a child's normal experience. Also relevant are the child's age and maturity, the nature and duration of the sexual contact, the child's physical and mental condition when the statement was made, and the relationship of the child and the accused.

*Id.* at 532-33 (footnotes omitted).

statement is made in response to questioning, especially leading questioning, the possibility arises that the questioner influenced the statement. However, directed and even leading questions do not *ipso facto* destroy trustworthiness. The fact that a child's statement was made in response to questioning is a relevant consideration, but should not be considered a litmus test for reliability.

Numerous courts and commentators observe that young children lack the experience to fabricate detailed and anatomically accurate accounts of sexual acts. When a child's out-of-court statement describes an event which a child of similar age and experience could not reasonably be expected to fabricate, the statement gains in reliability. *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988)(discussing excited utterance exception); *State v. D.R.*, 109 N.J. 348, 537 A.2d 667, 673 (1988); *State v. Sorenson*, 143 Wis.2d 266, 421 N.W.2d 77, 85, 87 (1988). Reliability is enhanced when a child describes sexual abuse in terminology one would expect from a child of similar age. *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77, 85 (1988).

Evidence that a child had no motive to fabricate at the time an out-of-court statement was made supports reliability. *State v. Kuone*, 243 Kan. 218, 757 P.2d 289, 292-93 (1988); *State v. J.C.E.*, 767 P.2d 309, 315 (Mont. 1988). An adult with custody or control of a child may bear a grudge against another adult, and may attempt to coach a child into making false charges of abuse. Thus, evidence of adult incentive to fabricate, or the lack thereof, is relevant. *State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1988).

The fact that the defendant had the opportunity to commit the act described in a child's statement may increase the trustworthiness of the statement. *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77, 85 (1988).

The foregoing factors are among the many indicia of reliability discussed in Federal and State court decisions discussing the trustworthiness of children's hearsay statements offered under the residual and child hearsay exceptions. *Amici* respectfully urge the Court to endorse the totality of the circumstances approach now in general use, and to eschew an approach that establishes a small



number of factors as litmus tests for reliability. The totality of the circumstances approach works well in practice, and protects defendants against unreliable hearsay evidence.

### CONCLUSION

When considering the trustworthiness of children's hearsay statements offered under residual and child hearsay exceptions, courts should consider all factors that bear on reliability, and should eschew reliance on a small number of factors that may lead to exclusion of reliable and important evidence.

Respectfully submitted,

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